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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Yvonne Gonzalez Rogers, Judge

CHASOM BROWN, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
VS.	)	**NO. CV 20-03664-YGR**
	)	
GOOGLE LLC,	)	
	)	
Defendant.	)	
	)	

Oakland, California
Tuesday, October 11, 2022

TRANSCRIPT OF PROCEEDINGS

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Tuesday - October 11, 2022 **2:00 p.m.**

P R O C E E D I N G S

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THE CLERK: Now calling CV 20-3664-YGR, Brown, et al. vs. Google LLC, et al.

Counsel, please approach the podium. Starting with the plaintiff, state your appearances for the record.

MS. BONN: Good morning, Your Honor -- excuse me. Afternoon. My --

THE COURT: People can't even remember if it's morning or afternoon.

MS. BONN: It's tough on a day like today.

I'm with Susman Godfrey on behalf of the plaintiffs.

THE COURT: And you are?

MS. BONN: Amanda Bonn.

THE COURT: Good afternoon.

MR. SCHAPIRO: Good afternoon, Your Honor. I'm Andrew Schapiro from Quinn Emanuel for Google.

Would you like me to introduce my colleagues who will be speaking today or have them --

THE COURT: So I appreciate that, Mr. Schapiro. Let's go back to -- Ms. Boon, is it?

MS. BONN: Bonn.

THE COURT: Bonn.

Are you going to be doing the entirety of the argument

today?

MS. BONN: No, Your Honor.

THE COURT: All right. Why don't you go ahead and tell me who is going to accompany you and what issues.

MS. BONN: Thank you, your Honor. I will be arguing portions of our motion for class certification dealing with the breach of contract claim, Google's consent arguments, Article III standing arguments, and Google's arguments regarding ascertainability and class member identification in part.

My colleague, Mr. Mark Mao from the Boies Schiller firm, will be addressing arguments regarding the Federal Wiretap Act, the California Invasion of Privacy Act, the CDAFA, and to the extent the Court has questions about ways in which class members could be identified other than through self-certification, he will be addressing that as well.

THE COURT: Okay.

MS. BONN: Mr. Lee, James Lee from the Boies Schiller firm, will be handling the *Daubert* motion that they filed as to our damages expert, Mr. Lasinski, and to the extent there are questions regarding how damages play into the class certification decision, he may answer some of those questions as well.

Mr Yanchunis from the Morgan & Morgan firm will be addressing issues concerning our UCL claim and our request that an injunctive relief class be certified under Rule 23(b)(2).

Ms. Jean Martin from the Morgan & Morgan firm will be addressing Google's *Daubert* as to our expert, Mr. Schneier.

And finally, my colleague, Alex Frawley from Susman Godfrey, will be addressing our motion to strike some of the Google declarations that were filed.

And I'm realizing, as I'm rounding the bend, that I forget to mention Mr. Mao will also be addressing the Psounis *Daubert*.

And Mr. Ryan McGee the Morgan & Morgan will be handling Google's *Daubert* as to our expert, Mr. Nelson.

THE COURT: Okay. So there is one unfortunate lonely person whose name didn't get called at your table. Might as well tell me who that is.

MS. BONN: That is our wonderful graphics person in case we have the opportunity to use some slides.

THE COURT: Okay. Welcome. You don't have to be a lawyer.

Okay. Mr. Schapiro, on your side, sir.

MR. SCHAPIRO: Thank you, Your Honor.

I hope we're not jumping up and down too much during the presentations. I'm going to be handling implied consent and issues that relate to that.

My colleague, Stephen Broome, is going to be covering the individual causes of action and also, if it comes up, the motion to strike that opposing counsel just mentioned.

My colleague, Viola Trebicka, is going to be discussing

the difficulties that damages models present for class certification and also the Lasinski *Daubert*.

Our associate, Alyssa Olson, will be covering the Schneier *Daubert*.

Our associate, Seth Fortenbery, will be covering -- handling the Nelson *Daubert*.

And our counsel, Josef Ansorge, will be handling the Psounis *Daubert*.

I think that covers everything, but if there are topics that we haven't covered, we'll find a way.

THE COURT: Okay. All right.

Let's go ahead, since you're both at the mic and since it is just a large issue, and deal with implied consent.

MR. SCHAPIRO: Can I grab my binder, Your Honor?

THE COURT: You may.

All right. So with respect to the issue of implied consent, given that you haven't had a chance, Ms. Bonn, to respond to the reply, we'll start with you.

MS. BONN: Thank you, Your Honor.

As plaintiffs have set forth in our papers, we think that the issue of implied consent will be resolved using common classwide proof and common issues of law that are applicable to the class as a whole. Those are the issues that will predominate, and I will explain why.

First and foremost, throughout the entirety of the class

period, it is undisputed that Google's form contract in its Privacy Policy included a provision that says, "We will not reduce your rights under this Privacy Policy without your explicit consent." And as we set forth in our moving papers, in light of that classwide common promise, in order for Google to even be heard to raise an implied consent defense, they would somehow have to demonstrate that that provision had been modified. And yet here, Google has no argument that they have presented that there was a contractual modification of that provision, that there was an oral agreement to modify that provision, or that there is any evidence whatsoever that a single class member waived Google's contractual promise only to reduce rights with the users' explicit consent.

And, in fact, in response to that argument, Google has made only one argument in one sentence of its opposition brief, and in that sentence --

THE COURT: Let me ask you a question that has been -- I've been toying with, and that is, are you aware of any law or any case where there is evidence proffered of some non-party to a contract that can be used to modify a contract between two parties?

MS. BONN: I am not, Your Honor.

THE COURT: I didn't think you were.

Mr. Schapiro.

MR. SCHAPIRO: Your Honor, I think that the position

that opposing counsel is taking puts the cart before the horse because we do not believe that a user's choice to use a service while aware of the conduct --

THE COURT: How do you know, though? All of the evidence that you have proffered is indirect, circumstantial evidence -- who's got their phone on? Somebody has a phone on.

MR. SCHAPIRO: Mine is on silent, but I don't think it's -- nope.

THE COURT: Make sure your phones are off. It's amazing what mics will pick up and what I can hear up here.

So you have -- Google makes references to news articles, academic reports, all sorts of stuff that is not customer specific and yet wants to use that kind of generic evidence to presumably modify an agreement between a particular person and Google. I just don't understand -- I don't know, is there any case -- can you cite to me any case where that's done?

MR. SCHAPIRO: I think the closest I have, though I agree I would not call it modifying a contract because, for reasons I'll explain, I don't think that's what's happening here -- certainly the *Gmail* case or the *Backhaut* case or the *Facebook vs. Campbell* case were cases where there was evidence out in the world of disclosures that had been made that in an individual action, the defendant would have had every right to question the plaintiffs about. And even in this case, two of the five plaintiffs admitted that they had seen articles about

the supposed collection of data that they're suing on in this matter.

So if this were an individual case and there were a plaintiff on the stand, we would have every right to ask that plaintiff, "Well, do you subscribe to *USA Today*, did you see the book that sold a hundred thousand copies published by plaintiffs' own expert, Mr. Schneier, who wrote that being in a private browsing mode does not mean that you are not seen on the web. It just means that you have local privacy." We would have the right to do that, and I think it is a fair interpretation of *Gmail*, *Backhaut*, *Facebook vs. Campbell*, and the two other cases that we cite.

THE COURT: All right. Response as to those cases and their applicability here.

MS. BONN: Yes, Your Honor.

In none of those cases was there a claim that the collection at issue breached an express contract that forbade the collection or that the contract at issue had an explicit consent standard in writing.

In *Backhaut*, the facts were that former Apple iPhone users brought a claim under the ECPA that even after they stopped using their Apple iPhones, when they sent text messages to other iPhone users, Apple was intercepting those. So these are people out in the world who no longer had a contractual relationship with Apple whatsoever.

In *Gmail*, likewise, some of the classes included non-Gmail users who were sending emails to other people who had a Gmail account. And I think it's worth noting that in *Gmail* where plaintiffs raised the argument that these types of news articles should not be considered on the issue of consent, the court expressly said that the plaintiffs might have a point if there was a breach of contract claim, but there was not one in that case.

And finally, in the *Campbell vs. Facebook* case, there is actually an interesting discussion on the topic of consent, and the court specifically pointed to the fact that Facebook had not notified users that this type of conduct would be collected. And the court expressed great skepticism that public articles could override the fact that Facebook itself had failed to make the disclosure.

THE COURT: The *Gmail* case -- I'm looking at your table of contents. It's not referenced as "Gmail." What is the full cite?

MS. BONN: It should start with "In re Gmail."

THE COURT: No. I'm not talking to you.

Mr. Schapiro.

MR. SCHAPIRO: Yes, Your Honor. It's *In re Gmail*, and it is 2014 Westlaw 1102660.

THE COURT: Did you cite that in your briefs because I'm looking at your Table of Authorities, and I don't see it.

MR. SCHAPIRO: Yes. We cited it in five different places, according to our Table of Authorities. This is our brief in opposition to the motion for class certification.

THE COURT: I see it now. All right.

Any comment on --

MR. SCHAPIRO: Yes.

THE COURT: -- her argument?

MR. SCHAPIRO: Yes, Your Honor.

So, first of all, Ms. Bonn began by saying well, in none of those cases was there an express contract, and of course here, as I think Mr. Broome is going to amply demonstrate, there is no express contract saying that Google is not going to collect this data. There are statements from which some plaintiffs claim to have inferred that this data would not be collected. So that's not a distinction.

But in the *Campbell vs. Facebook* itself -- that's 315 F.R.D. 250, Northern District of California -- the court denied class certification stating individual issues of implied consent do predominate due to the media reports on the practice because, quote, as long as users heard about it from somewhere and continued to use the relevant features, that can be enough to establish implied consent.

Also in the *Backhaut* case, Northern District of California, the court determined -- here I'm paraphrasing -- implied consent defeats predominance where, quote, numerous

sources of information could have put some -- could have put some proposed class members on notice of the interception.

We also cite *Torres vs. Nutrisystem*, 289 F.R.D. 587, and *Federated University Police Officers Association* --

THE COURT: Right. And these are all district court cases. None of them are binding, but I take your point.

MR. SCHAPIRO: That is correct, Your Honor.

I would say what I hope might be persuasive in addition to the cases is logic and common sense. We have a situation here where not only is there --

THE COURT: Let me tell you what concerns me about logic and common sense.

Logic and common sense suggests to me that when mega corporations make promises and do not fulfill those promises and do not want to resolve their cases by settlement, that a jury should decide. So I don't know if that means that in this particular case, part of it gets decided or nothing gets decided, but it concerns me that somehow you don't want to be held accountable for what you say. And by "you," I obviously mean your client.

MR. SCHAPIRO: Sure. Respectfully, Your Honor, it won't surprise you to hear our position is that everything we have said is accurate and --

THE COURT: Then what's the concern? Then what's the concern? If what you have said is accurate and if that is what

the evidence shows, then you should have no concern.

MR. SCHAPIRO: Your Honor, it would nevertheless, under *Wal-Mart vs. Dukes* and its progeny be improper to take for -- to treat as a class action a case in which there is a very strong individualized affirmative defense --

THE COURT: But there it was very different because in *Wal-Mart vs. Dukes*, you were talking about individual employees. Very different from this kind of circumstance where you have users of a product and statements -- policy statements which explain to people what they can expect and what there is an agreement for using your product. That's different than -- it's much more like a consumer class action, which is routinely certified, than it is an employee labor circumstance, which is quite different.

MR. SCHAPIRO: Your Honor, I agree a hundred percent that the factual background of the *Wal-Mart vs. Dukes* case is different in substantial ways. The point that I was citing it for is that a defendant cannot be deprived of a meaningful defense that it would have in an individual case just because a class is going to be treated in an aggregated way as a class action.

And what is the statement -- the statements that were made here were that you can browse privately and others who use your device won't see your activity. The surveys that are in the record from both sides show that a substantial portion of users

understand that perfectly well. They say, "We know what that means. It means that if I'm doing something on my device, it's not going to be seen by people who are using my device," but not that it somehow makes them invisible on the web.

Article after article, including statements by the -- published statements by the plaintiffs' own expert also showed they understood precisely what Incognito does, but if we're faced with a class where we have a few representatives who say, "Well, I never saw this," or "I didn't understand it," we will be at a --

THE COURT: So how many millions of people then did not? How many millions of people did not understand it, even based on your survey?

MR. SCHAPIRO: It's hard to know because this gets into another problem with class certification. It is impossible to truly know how many people --

THE COURT: Ballpark, Mr. Schapiro.

MR. SCHAPIRO: Ballpark, tens of millions.

THE COURT: Tens of millions of people did not even -- even in your best case, did not understand.

MR. SCHAPIRO: I'm sorry. I misunderstood you. How many people on our surveys? Yes. We're talking -- when we're talking about a class of hundreds of millions of people, if you have a large percentage that had awareness and another percentage who did not have awareness, the numbers are going to

be large no matter what. But all of those people then -- not all of those people are entitled to recover.

THE COURT: But tens of millions of people would be.

MR. SCHAPIRO: No. They would not be entitled to recover. There are other reasons why they would not be entitled to recover.

THE COURT: I'm just saying that this notion that you're too big to be held accountable concerns me.

Response.

MS. BONN: Your Honor, every single class member, whether this case was tried one by one or as a class action, would have available to them the same common argument that Google promised in its form contract not to reduce rights without explicit consent.

These class members were bound by a form contract. Mr. Schapiro says, "Well, we don't think the contract means what plaintiffs think it means." That is a common issue and a common argument that will rise or fall in one stroke. That is all that *Wal-Mart* demands.

And so the notion that somehow this case will turn on what individual class members privately believed goes against basic contract law in California and every other jurisdiction. It is an objective manifestation theory of consent. Private, unexpressed, subjective beliefs don't control and especially not where a company like Google has chosen affirmatively to

place in its own Privacy Policy a promise that says "We will not reduce your rights without your explicit consent."

And now effectively what Google is arguing is that "We can promise people in our contract that we won't collect your private browsing data. We can promise to rely on an explicit consent standard, but if some news organizations begin to suspect what we might be doing and publish articles, well, that means that our contractual promises aren't worth the paper they're printed on. We cannot be held accountable, and Americans cannot control in any way what we collect, even when we have a contract that says they can."

THE COURT: Mr. Schapiro, can you tell me whether -- I just want to make sure I understand the evidence.

Can you identify users who clicked on the FAQs? Can you identify who they are?

MR. SCHAPIRO: Specifically who they are, no -- well, it depends. I think if -- there would be some unusual circumstances, but, no. We know that there were numbers of -- the numbers of people who did. I think that's in our brief.

THE COURT: Can you identify the individuals who used the developer tools?

MR. SCHAPIRO: Other than, of course, by cross-examination, which, you know, as --

THE COURT: I'm talking about technology. Can you identify any of the individuals who used the developer tools?

MR. SCHAPIRO: Not as far as I'm aware, Your Honor.

THE COURT: Can you identify any of the individuals who read any of these disclosures that you rely on?

MR. SCHAPIRO: Well, we can identify people who read -- if they were setting up Google accounts, for example, Terms of Service or at times the Privacy Policy -- which, by the way said, nothing about private browsing until mid 2018, contrary to what was just said.

So in some circumstances, yes; in some circumstances, no, would be the short answer, Your Honor.

THE COURT: So it seems to me the best you have is really kind of circumstantial class evidence that in many ways you don't have any evidence that is specific to the person like what existed in the *True Health* decision by the Ninth Circuit.

MR. SCHAPIRO: Your Honor, I think actually it cuts the other way. If we can't overall in some aggregate way say all right, well, here is a way we can pick out individuals who did or didn't have awareness of what Incognito actually does before using the service, then we should have the right -- and I think under *Wal-Mart vs. Dukes* the Court has to assume we're going to present that defense --

THE COURT: In *Wal-Mart vs. Dukes*, there was specific evidence; that is, the employees' interactions with their supervisors, that was all specific to the employee. That's why I'm asking whether you can identify or whether you can --

whether you can take that evidence that you've thrown out there as evidence of implied consent and actually connect it to anybody.

MR. SCHAPIRO: Your Honor, a finder of fact, if this were an individual case and we had a witness there, would be entitled to find, based on cross-examination, about that person's habits, that person's knowledge, that person's use of developer tools, what magazines that person reads -- to conclude that that person had awareness, and that's why the *Campbell* case came out the way it did, the *Gmail* case came out the way it did, the *Backhaut* case and others.

I would also point out that the contract here, of course, does not affect the other -- the claims other than breach of contract here, the individual causes of action that I gather Mr. Mao is going to be speaking about and that Mr. Broome is going to be speaking about.

But, again, we, during discovery, would have the right -- and in this case, two of the plaintiffs said that they read such articles. Two of the 40 percent of the plaintiffs in this case agreed that they had read such articles.

So if this case were just treated in an aggregated fashion where we would not have the right to conduct discovery of or ask similar questions of tens of millions of people but instead could be found liable to all of those people if certain other conditions are met would be -- would not be fair and would not

be --

THE COURT: Only as to damages, not as to injunctive relief.

MR. SCHAPIRO: I can address --

THE COURT: All of your arguments in that regard go to damages.

MR. SCHAPIRO: They go to -- correct. They go to the causes of action -- that is true. I can address injunctive relief if --

THE COURT: I'm just making clear that none of the arguments with respect to implied consent really impact a claim for injunctive relief.

MR. SCHAPIRO: I mean, the one way I would say that the points I've just been making do affect a claim for injunctive relief is that the sweeping injunctive relief that the plaintiffs are asking for here is injunctive --

THE COURT: Which would affect tens of millions of people.

MR. SCHAPIRO: That we believe many people would not want. Okay? So the fact that there are many people out there who understand exactly how private browsing works and who want it to work that way, that is a relevant fact that I think, if we were fighting about an injunction, would be before this Court because an injunction would not be practical or sensible. Certainly the injunction that --

THE COURT: But, again, that doesn't have anything to do with implied consent.

MR. SCHAPIRO: It has only to do with the knowledge and awareness that I was speaking of. Yes. There is not an implied consent defense that I can think of that is specific to injunction.

THE COURT: All right. Let's go ahead and move on.

MR. SCHAPIRO: Just can I, in closing, state again, Your Honor, that the --

THE COURT: Why would you state again, Mr. Schapiro?

MR. SCHAPIRO: Sorry. I would just like to make sure that I've emphasized that the implied consent defense -- so the -- it is -- the implied consent defense we believe knocks out not only the contract claim that we've been talking about but all of the others, and there is no argument about an express contract somehow superseding the implied consent as to those claims.

MS. BONN: May I respond to that briefly, Your Honor?

THE COURT: You may.

MS. BONN: Thank you.

We disagree fundamentally that Google's contractual promise, "We won't reduce your rights without your explicit consent," only applies to a breach of contract claim. It doesn't say, "We won't reduce your rights in contract without your explicit consent."

And California law, which governs here, recognizes that parties may contract around defenses. Parties may contract around a statute of limitations. And if Your Honor looks at the *In Re Pharmatrak* decision from the First Circuit, it is a Wiretap Act case in which the court declined to find implied consent precisely because the express contract, when it was being drafted, helped provide, quote, assurances to the plaintiff that the data would not be collected.

There's a second case we cite, *Harris vs. Comscore*, that likewise applies this question of is there an express contract not only to a contract claim but to wiretap claims.

MR. SCHAPIRO: Your Honor, the *Harris vs. Comscore* case that the plaintiffs rely on, which is an out-of-circuit case, was rejected by Judge Koh in the *Gmail* case who wrote that she finds it, quote, unpersuasive because, quote, express and implied consent are analytically distinct, and, quote, a finder of fact is allowed to consider a broader set of materials in answering the factual question whether users impliedly consented.

On this point about we won't reduce your rights, I think our position is clear and correct, which is this isn't a dispute about whether anybody reduced rights in a contract one way or another. This is a question about whether, with regard to the contract claim, Google breached the contract or did not, and one question that is relevant to that is whether plaintiffs

impliedly consented or waived their claims by using the service with full knowledge of what it does, and it does what it's supposed to do.

THE COURT: Moving on, let's go ahead and talk about the *Dauberts*. We'll start with Lasinski. That's Mr. Lee?

MR. LEE: Yes, Your Honor.

THE COURT: And -- let's see.

MS. TREBICKA: Viola Trebicka for Google, Your Honor.

THE COURT: I'm looking for your -- well, your last name?

MS. TREBICKA: "T," as in "Tom," R-E-B as in "boy," I-C-K-A.

THE COURT: Okay. I have you. Thank you.

Let's go ahead and start with you, Ms. Trebicka. Go ahead.

MS. TREBICKA: Yes, Your Honor.

And the Lasinski *Daubert* is really intertwined with the damages issues that are discussed in plaintiffs' motion for class certification as well. And looking at the damages inquiries here, there's several -- there's four fundamental issues that preclude class certification.

The first is that individualized injury determinations will --

THE COURT: So I'm not talking about class cert. What I'm talking about -- I want to focus on the *Daubert*.

MS. TREBICKA: Absolutely, Your Honor. Then I will focus on Mr. Lasinski's method.

He has three damages opinions: A restitution opinion, an unjust enrichment opinion, and half a statutory damages opinion.

The unjust enrichment and restitution models that Mr. Lasinski puts forth violate *Comcast*, Your Honor, because they do not measure the damages that flow as a result of the alleged wrong. And I'm not talking here about the damages --

THE COURT: You understand that damages models can be aggregate in nature.

MS. TREBICKA: Yes, Your Honor. They can be aggregate in nature, but for -- so this is where we intersect with class certification. Damages models can be aggregate in nature. Mr. Lasinski's damages models are deeply flawed, and I'm -- I would like to discuss that.

In addition to that, Mr. Lasinski's allocation methods that are necessary for plaintiffs to prove --

THE COURT: You need to get to the point. I've read your stuff.

MS. TREBICKA: Uh-huh.

THE COURT: So let's get to the point here.

MS. TREBICKA: Let's get to the point, Your Honor. The question is --

THE COURT: I don't want to talk about allocation.

You don't have standing, but we'll get -- let's focus on the other.

MS. TREBICKA: So restitution model first, Your Honor. It is entirely arbitrary. Mr. Lasinski uses a $3 per month per device --

THE COURT: That's not arbitrary, is it? It's, in fact, what your client pays individuals. How is that arbitrary?

MS. TREBICKA: It's arbitrary, Your Honor, because what it is based on is the Ipsos study that pays for data that is qualitatively and quantitatively different, and these are not my words. These are Mr. Lasinski's words.

So it's the same, Your Honor, as if a farmer --

THE COURT: Can I --

MS. TREBICKA: May I explain?

THE COURT: No.

Can you remind me how many cases you've tried to a jury?

MS. TREBICKA: Myself, Your Honor?

THE COURT: Yourself, yes.

MS. TREBICKA: A couple. Two.

THE COURT: So every day --

MS. TREBICKA: Not as a first-chair lawyer, Your Honor, but, yes. And many more that did not reach verdict, but, yes.

THE COURT: Okay. Well, I'm talking about jury

verdicts, jury trials.

Every day in courtrooms across the country, juries are instructed in slightly probably different -- slightly different terms, but they're basically instructed that with respect to damages, they cannot be speculative. Damages -- especially aggregate damages and especially in patent cases, I would say, are not always mathematically precise nor do they have to be. Juries are instructed in that way. That's the law. They just can't be speculative.

When I have an expert who analyzes the opposing party's practices and finds a payment method where they have -- that party has decided that that's reasonable compensation for a good, that is data in this case, that doesn't seem to me to be speculative.

Now, I may agree with it or not agree with it. I may challenge it, but there seems to be a reasonable basis for the number that he's chosen. He didn't pick it out of thin air.

MS. TREBICKA: May I respond?

THE COURT: You may.

MS. TREBICKA: Two bases, Your Honor. First is that it is the same as if a farmer who believes that his avocado should be sold for $3 would -- if the -- a bushel of corn is taken from him, we'll say well, that bushel of corn should also be valued at $3. Yes, they're both produce; yes they're both agricultural produce, but they are not the same, Your Honor.

That is how different the data is here.

THE COURT: Why are they the same? She is saying they're not the same. It's not the same product.

MR. LEE: Sure. I will start, Your Honor, with I think we can all agree that the $3 is an input and *In Re Juul Labs, Inc. Marketing, Sales Practices* -- it's 2022 Westlaw 1814440, which was cited in our opposition -- says criticisms about the input that are used are classic criticisms that go to weight, not admissibility. So we can have this fight but it will have to be a jury that decides whether these differences matter. And I'll get to the differences.

So it's sort of strange that Google is saying that this input is somehow unreliable given, as Your Honor pointed out, that it's the exact amount of minimum payment that's given to users --

THE COURT: Get to the product.

MR. LEE: Sure.

So here is the differences that they say, right? They say that Google says that Screenwise asks for more personal information, like your phone number, your address, things like that, had certain rules and requirements to participate, and collected more data. What they don't say is that Mr. Lasinski backed all of that out, and he did not include any of those additional payments for those extra -- for that extra information.

For instance, $20 for providing personal -- your personal information and agreeing to the survey rules, Lasinski excluded that. Five dollars for having WiFi devices connected to a special Screenwise router that could collect more information, Lasinski excluded that. Two dollars for allowing Google to track across multiple devices within the home, Lasinski excluded that. All he kept was the $3, and that $3 is what they pay in order to track their online browsing. That's it.

THE COURT: So if the $3 doesn't track online -- well, let me ask. Does the $3 track online browsing?

MS. TREBICKA: It tracks more than that, Your Honor, and I'd like to show you a slide, if you have an interest in that because --

THE COURT: Okay. Go ahead.

MS. TREBICKA: Would that be okay, with permission? Ms. Olson is putting that up for me.

THE COURT: So the $3 does track online browsing?

MS. TREBICKA: It tracks online browsing for not private browsing mode, all online browsing and more.

And, Your Honor --

THE COURT: So you're suggesting it should be less than $3 because it tracks more than just online browsing?

MS. TREBICKA: No, Your Honor. I'm suggesting that it is entirely unconnected to the private browsing de-identified data that Mr. Lasinski's job is to value to say look at this

other data that Google collects in another circumstance, that data is valued at $3 per month per device, according to Mr. Lasinski. They should be the same. They are not, Your Honor.

And to the product question that you -- may I also answer the product issue because I think that's -- that's a very, very good question.

THE COURT: Do you have a hard copy for me of that slide?

MS. TREBICKA: Hard copy?

MR. SCHAPIRO: I might have one.

MS. TREBICKA: We're looking, Your Honor.

THE COURT: Go ahead.

MS. TREBICKA: Your Honor, the product question is a very -- is a very good one, and I direct Your Honor's attention to the ***Freitas vs. Cricket*** case. It's a recent case out of the Northern District of California. And in that case, Your Honor, the judge found this model to be unreliable where the expert looked at a 4G phone to identify what the damages would be related to a 5G phone, and said yes, it's a phone; yes, it's a G phone; however, the problem is that there are so many additional qualities and features --

THE COURT: Yeah. But why doesn't that go to weight as opposed to admissibility?

MS. TREBICKA: It doesn't, Your Honor, because it's so

arbitrary. There is a rigorous --

THE COURT: It's not arbitrary. Arbitrary means he has gotten it from nowhere. He just pulled a number. And, by the way, I have had economists that do that. That's not what it is.

There has to be a substantive difference, and if that's all it is, which is a substantive difference, then it goes to weight.

MS. TREBICKA: Your Honor, with due respect, we disagree. We think that the data --

THE COURT: Mr. Schapiro, do have you that slide or not?

MR. SCHAPIRO: We do not have a hard copy of that. I apologize, Your Honor.

MS. TREBICKA: The data issue, the private browsing de-identified data is so different from the data --

THE COURT: So why? That's the heart of it. So why? He says it's online browsing. You're collecting the same stuff. All you're saying is that there's more. We're collecting more. So that means to me maybe it's $2, not $3.

MS. TREBICKA: No, Your Honor. We're saying it's -- again, Mr. Lasinski words -- qualitatively and quantitatively different, so it's not just more. It's actually qualitatively different from the data at issue here.

These differences matter, Your Honor. If this case goes

to the jury --

THE COURT: I'm still waiting to hear what the differences are that matter so much.

MS. TREBICKA: Your Honor, the private browsing data is de-identified. It is not connected to an individual. This data is connected to your specific name. The data that -- that -- that is attached to the $3 per device per month. That is a fundamental difference because if Google does not know who the de-identified pseudonymous data is related to, then that data is necessarily a lot -- a lot less worth, and Mr. Lasinski has done nothing to identify that.

THE COURT: Except that data was never supposed to be taken if we get to a damages stage; that is, if you get to a damages stage, then a jury has decided that it should have never been taken in the first place, and that makes it perhaps more valuable since it shouldn't have been taken in the first place.

MS. TREBICKA: Your Honor, I think that is not necessarily a distinction that governs when we're talking about why this number, the $3 number, should be attached to this data that Your Honor is suggesting may not have -- should not have been taken in the first place. It's just not -- logically does not follow. Just because the data was -- should not have been taken, it does not mean that it is valued at a certain amount of money that data that was properly taken is valued at.

THE COURT: Okay. Let's move to a different model.

MS. TREBICKA: Yes, Your Honor. And we are very happy to email the slide as an email to the clerk. Would that be appropriate?

MR. LEE: If that's the case, Your Honor, may I respond to the slide?

THE COURT: Well, we need -- we are going to move on. I won't -- I didn't read it, so we'll just stand on the briefs.

MR. LEE: Okay.

MS. TREBICKA: Your Honor, may I also address Mr. Lasinski's unjust enrichment model?

THE COURT: Yes.

MS. TREBICKA: Mr. Lasinski's unjust enrichment model is -- overstates damages because in all three scenarios, it evaluates -- it values data that for unjust enrichment --

THE COURT: Okay. But overstating damages is not -- again, that goes typically to weight as opposed to admissibility. His math isn't wrong; right?

MS. TREBICKA: No, Your Honor, but the biggest problem with it is that there is no way to actually subtract the data that should not have been valued as part of the unjust enrichment, and that is a fundamental flaw in his -- in his methodology. He has no way to actually value the data at issue. It is not connected to the damages -- I'm sorry -- it is not connected to the offending conduct.

THE COURT: Response.

MR. LEE: Yeah, Your Honor.

Mr. Lasinski used the key input for unjust enrichment. He used Google's own internal analysis. So the internal analysis that Google prepared, I won't say it's name, but it was a financial impact analysis for -- which analyzed the percentage of Google Incognito traffic across its different business segments.

So he used that percentage to determine how much Google enriches itself from Incognito traffic and then he extrapolated that out for other relevant private browsing data. And Google actually in the papers does not take issue with this methodology.

Their main concern here is what they say -- is what Ms. Trebicka just said. She said it's too high. Why is it too high? Because they said he didn't look at enough of the costs.

THE COURT: Right.

MR. LEE: Right? And let's be clear. Mr. Lasinski read our papers. He did consider the costs. There just weren't any.

At his deposition, he explained the four things he did to discount whether there were any costs or not. The first thing he did is he looked at Google's expert, Dr. Strombom's report, to see if he identified any costs. Now, Dr. Strombom calculated costs from Google's overall business, but he never

isolated costs that were tied specifically to private browsing traffic, so Mr. Lasinski didn't find that helpful.

What did he do next? Mr. Lasinski then spoke to the plaintiffs' technical expert, Mr. Hochman, and Mr. Hochman explained that Google has already built the infrastructure to collect all browsing data. It's a sunk cost so it's not an incremental cost. So if Google stopped collecting private browsing data, which is just a tiny sliver of all the browsing Google collects, there are no cost savings.

Mr. Hochman also explained the true cost of data collection actually comes from processing power and energy, and that cost is passed off to users because it comes from their device.

THE COURT: So, again, why isn't that an issue of weight? As I understood it, that was the main concern or argument that the defendants had, which is that he didn't back out costs. But there's evidence in the record -- and I'm not here to decide one way or the other -- but there's evidence in the record that Google doesn't have costs relative to this slice of the pie.

MS. TREBICKA: Your Honor, that is only part of the challenge that we have to the unjust enrichment model, and I'd like to reserve some time to talk to the other part of the challenge that we have.

On the issue of costs, our motion to exclude is to exclude

the opinion that says costs do not have to be taken into account for unjust enrichment damages. Whether those costs exist or not, we're happy to duke out in front of the jury. The problem is that Mr. Lasinski here is essentially rendering a legal opinion saying costs should not be excluded.

THE COURT: That's not a legal opinion.

Next issue. What else did you want to --

MS. TREBICKA: The issue is -- yes, Your Honor. So we were talking about the three scenarios of unjust enrichment. The problem is one of methodology. It's not one of we don't like how high the damages are. And the methodology that the problem -- and the methodological problem is that the fact that Mr. Lasinski values all revenue from transmissions, whether or not -- on the basis of third-party cookies, assuming that there was no consent for those third-party cookies, whether or not there is evidence that there was actually consent given in the form of -- for the third-party cookies -- in the form of the triggering of the new tab page to consent to third-party cookies. That is a new trigger on the new tab page that comes up with every Incognito browsing session that says it's okay to allow third-party cookies to track you. Those should be admittedly excluded, and he's not excluding them.

THE COURT: All right. A response.

MR. LEE: Sure.

Counsel didn't tell you what percentage that actually

amounts to. Based on what Google has produced in the case, that's less than one percent of all users. There is a Google internal document that says "99.1 percent of our Incognito users have not opted in to this third-party tracking." And Google's response is, "Well, it may have gone up since it launched." Not a shred of evidence of that in the record.

THE COURT: Any response?

MS. TREBICKA: Your Honor, the document that Mr. Lee is pointing to was a month after this feature was launched, and of course it has gone up since.

THE COURT: And the date of it was?

MS. TREBICKA: It was July-- so it was launched in June 2020 and the date is July 2020. It was within a month of the launch, so it's not proper evidence.

Your Honor, there is an additional point with respect to unjust enrichment and how the methodology -- the methodology is wrong because there's also evidence in the record of pop-ups that a user -- of individual websites, not Google, that a user -- with which a user can provide consent to allow third-party cookie tracking.

THE COURT: Okay. Pop-ups.

MR. LEE: Sure.

I really want to say one more thing about the third-party tracking, but if Your Honor wants me to go to pop-ups, I will go to pop-ups.

THE COURT: Pop-ups.

MR. LEE: Okay.

So the pop-ups that counsel is referring to, they pop up on third-party websites. The thing she didn't tell you is that none of them say in their -- when it pops up, "you are consenting to data collection in private browsing mode." None of them say that. So that's not something that can be deducted here because what we're focused on, what Mr. Lasinski is focused on is the traffic when you're in private browsing mode.

THE COURT: Okay.

MS. TREBICKA: May I respond?

THE COURT: You may.

MS. TREBICKA: Users are obviously aware of the fact that they are in private browsing mode when the pop-up comes up, so the consent to the third-party cookie tracking is proper.

THE COURT: All right. Let's see. We've got statutory damages.

MS. TREBICKA: Yes, Your Honor. May I go first?

THE COURT: Uh-huh, you may.

MS. TREBICKA: Mr. Lasinski's bases for statutory damages have a major issue, Your Honor, and that is the fact that -- sorry, Your Honor. I'm trying to find my notes.

THE COURT: I will tell you what the major issue is. He hasn't identified California -- how he is going to get to a

number for the California subclass. It's not in the report.

MR. LEE: What's in the report, Your Honor, is that he has an aggregate statutory word for California that he says can be performed, and the way he is going to do that is extrapolate the private browsing use by California residents.

THE COURT: But how do you get that number?

MR. LEE: He uses the California population as a percentage of the total U.S. population, and he already has the aggregate damages. He has the whole pie. So if we are trying to figure out which part of the pie goes to California, you extrapolate by the population based in California. And Google offers no legal authority that it can't be done this way.

THE COURT: Okay.

MS. TREBICKA: The California -- yes, Your Honor. The California issue --

THE COURT: You can say whatever. That's the one I wanted to hear from.

MS. TREBICKA: Yes, Your Honor.

The methodology used is unreliable as to the California issue, and we have addressed it in our papers.

There is a manageability issue that goes with the statutory damages as Mr. Lasinski has framed them, Your Honor, and that's what I would like to talk about with your permission. And that issue is --

THE COURT: So manageability is not, as I recall, a

Daubert-specific issue. Can we focus -- can we stay focused on *Daubert*?

MS. TREBICKA: Yes, Your Honor.

We believe that Mr. Lasinski's statutory bases are improper because they are -- they will necessitate individualized damages into how many of these violations that he claims each of the bases will calculate will go for each class member. So it's essentially -- it's not so much a *Daubert* issue as it is a manageability class certification issue, Your Honor, so if you'd --

THE COURT: So I'm not talking about class cert right now.

MS. TREBICKA: I understand that, Your Honor.

MR. LEE: May I have the last word on the California issue, Your Honor?

THE COURT: You may.

MR. LEE: Okay.

So what happened was Mr. Lasinski initially assumed that the California wiretap statute would apply nationwide. He did create a carve-out just in case Your Honor would decide that it was to California only. And given your decision in the ***RTB*** case, that ended up being prescient. So at the time that he wrote his report, though, he didn't know that the claims would be limited to California.

The truth of the matter is that based on the discovery

taken in this case, we can hone in on California usage much more than population percentages if that's what Your Honor is concerned about. For instance, we can do it by IP address. We can do it by Geolocation. This is Google. Of course they can do this. There was just a case settled about this less than a month ago.

So if we need to limit it in some way by California residents and Your Honor requires a little more precision, that can easily be done on the back end.

MS. TREBICKA: May I respond, Your Honor?

THE COURT: You may.

MS. TREBICKA: That is speculation that we're hearing today for the first time. Mr. Lasinski's methodology, which we are here to address, does not do any of that work, and it is extremely doubtful that it is able to be done.

THE COURT: Okay. Moving on. The next expert I have is Mr. Nelson.

MR. BROOME: Your Honor, before we get to Mr. Nelson, may I just briefly address the issue of confidentiality of documents and ask all parties to be mindful of discussing documents that are under seal?

THE COURT: So far I haven't heard anything that is so specific that there would be a problem.

MR. BROOME: I understand, Your Honor. I believe one document that is in fact under seal was just referenced but --

THE COURT: So a generic reference is not a violation of a sealing order. I think everybody -- I'm not going to kick out everybody in this courtroom.

Everybody be cognizant of it. I don't want to -- if there's a document reference you want me to pull up, I can do that. You all have -- are professionals, and you're all operating under Rule 11.

MR. BROOME: Understood, Your Honor. Thank you.

THE COURT: Okay. Mr. Nelson. So I have -- all right. Remind me who you are.

MR. FORTENBERY: Good afternoon, Your Honor. This is Seth Fortenbery. I'm an associate at Quinn Emanuel and a Google attorney.

THE COURT: Okay. Hold on. How do you spell your last name?

MR. FORTENBERY: F-O-R-T-E-N-B-E-R-Y.

THE COURT: Okay. And?

MR. MCGEE: Good afternoon, Your Honor. Ryan McGee of the law firm of Morgan & Morgan.

THE COURT: Okay. So Mr. Nelson. I think the main issue that there is with Mr. Nelson is his inability to connect his years of service as an FBI agent with information that may or may not exist in private browsing mode specifically. That's the concern. I don't see where he does that. It's one thing to say generically, "I have 30 years of experience working with

Google and getting information." We all get them. We see them. I try criminal cases, and it's based on that kind of evidence, so I understand that. That's not the concern.

If he was just saying generically or if Google was saying generically that they can't do it and he's saying, "Yes, you can, you've been doing it for 30 years," it would seem to be fine. The problem is that he's making representations regarding a specific mode and yet there doesn't seem to be a sufficient basis upon which he's making that opinion.

What am I missing, Mr. Fortenbery?

MR. FORTENBERY: I think you've got it exactly right, Your Honor.

THE COURT: So nice; right? All right.

MR. MCGEE: Your Honor, Mr. Nelson is offered as a rebuttal expert to Google's expert, Georgios Zervas, who says essentially the data from private browsing is orphaned on the islands, and Google is never able to find it, locate it, or produce it to a third party. And with Mr. Nelson's experience with the FBI, he testified that he was involved in hundreds of investigations where information was produced based on an IP address. Google never denied him production saying, "This section of this data is private browsing information and we can't give that to you." They never denied one of his requests saying, "We need consent from these people because certain of this information may be subject to private browsing information

or private browsing mode." And he testified that he had had hundreds of interactions with Google attempting to obtain and successfully obtaining information from Google just based on an IP address and a date range.

THE COURT: Right. And I don't disagree with that assessment, but how does he get to the link, because I don't see it in the report --

MR. MCGEE: Sure. The link, Your Honor, would be the three individuals that he spoke with, the subjects of his investigations. I believe it's paragraph 35 of the report. It says that he had spoken with people during his investigations who admitted, when confronted with the evidence, that activity was done in a private browsing mode and that they were surprised to see that he had that level of detail and that level of information.

THE COURT: So doesn't -- doesn't Mr.-- and I don't know if I am saying this right, Hochman?

MR. MCGEE: Hochman, Your Honor.

THE COURT: Doesn't Mr. Hochman address this issue in his report from a technical perspective?

MR. MCGEE: I believe so, Your Honor.

THE COURT: So why do you need someone who's not able to make that connection other than those -- I'll grant you the three people, but is it -- it sounds duplicative at best.

MR. MCGEE: It's a real-life observation of this

information being produced.

THE COURT: All right. A response.

MR. FORTENBERY: Yes, Your Honor.

I think a couple points. First, Mr. McGee, on behalf of plaintiffs, opened saying that well, this is a rebuttal report, and it's a rebuttal to Mr. Zervas' report. And I just want to point out for the Court that Mr. Zervas, the report that's being identified there, is a 211-page technical report.

Here in that report, Mr. Zervas doesn't purport to talk about Google's server side information: What's saved, what's collected. The only thing that Mr. Zervas is saying in the paragraphs that plaintiffs quote is that in -- on the browser side of things, on the Chrome side of things, Chrome is not storing data locally on the computer -- on the particular person's computer.

So when it comes to Mr. Nelson trying to say what Google does or whether Google can link IP addresses to particular private browsing data, that's wholly out of cloth and has nothing to do with what Mr. Zervas was opining on, and so it can't properly be characterized as a rebuttal.

Second, I think Your Honor hits on a very good point. Mr. Nelson doesn't simply purport to say that "I worked with Google over my" -- "my," you know, "decade" -- "several decade-long career, and in those" -- "in that career, I received data from Google." That would be a wholly different

opinion. Instead, he wants to make another analytical leap, and that analytical leap is that, "The information I received from Google was private browsing mode data," one, and, two, that private browsing mode data through IP address alone and a date range can be linked back to individual users and devices.

Now, that alone is an analytical leap. And you put the question to Mr. McGee, how do you connect those two things. And Mr. Nelson, in his deposition, plaintiffs today, say that the reliance there is the statements of three accused criminals in investigation saying they were surprised the FBI had data because at some point, when they were conducting those actions that were being investigated, they used a private browsing mode.

Now --

THE COURT: So can I -- let me interrupt you.

MR. FORTENBERY: Yeah.

THE COURT: Mr. McGee, is it also true that Mr. Nelson never identified the actual people, so there's no way that Google could even verify or not verify what it is he's claiming to know?

MR. MCGEE: That's correct, Your Honor. In the --

THE COURT: Why didn't he?

MR. MCGEE: He cited confidentiality issues with the Federal Bureau of Investigation. He provided details related to one of the investigations that he was questioned on, but

when it ultimately came to details that would sufficiently identify victims and subjects of those investigations, Mr. Nelson cited confidentiality concerns.

THE COURT: Okay.

MR. MCGEE: And he was not questioned on the two other investigations, Your Honor, at all.

MR. FORTENBERY: Your Honor, if I may respond to that last point. This is something in their brief that we very much dispute.

During the deposition when we asked Mr. Nelson about his -- the statements of the suspects, he stated that he would not provide any details about any cases no matter how minute they may seem. So while plaintiffs have characterized Mr. Nelson's testimony as simply saying that he won't provide the identity of suspects or that type of thing, in reality -- or that Google should have asked more questions of Mr. Nelson to get more details on the second and third suspects, that just doesn't comport with what he testified about or what he was willing to give Google.

THE COURT: Yeah. I'm not sure the plaintiffs can have it both ways.

MR. MCGEE: And, Your Honor, that was briefed, and I'm not going to belabor that point. But one thing the defendant -- excuse me -- Google in this case -- it really comes down to a dispute about reliability. They don't dispute

that the practice occurs. They don't dispute that they provide information that is from a private browsing session to law enforcement and that that can be retrieved with an IP address and a date range. So in a reliability analysis, which is the third prong of the *Daubert* inquiry, it's whether it's independently verifiable, and just like with the prior analysis that you discussed with counsel before us on Lasinski, it's not arbitrary. He didn't pick this out of thin air. It's from his own experience, and he was providing that as the foundation for the rebuttal opinion that he was providing in rebuttal to Professor Zervas.

THE COURT: Well, if they don't dispute it, then you don't need an expert to -- an expert who's -- you don't need an expert to rebut something that's not being disputed.

MR. MCGEE: I think that what Professor -- what Mr. Nelson provided was that Professor Zervas' opinion was misleading and incomplete, Your Honor. But if you're suggesting that Mr. Nelson should be a percipient witness and a fact witness, then that's something that could be discussed, but I think right now, we would contend that he's not subject to a *Daubert* and that it's a weight/credibility issue.

THE COURT: Like I said, my concern with him is that he hasn't -- he hasn't justified the basis for his analytical leap, and -- well, is that -- are you, in fact, disputing -- is Google disputing that they can identify individuals who -- with

an IP address and a date range in a private browsing -- are you disputing that or not?

MR. FORTENBERY: Yes, Your Honor, we are disputing that. The fact that I think -- one thing that plaintiffs say in their response is that this was -- Mr. Nelson's opinion was confirmed by the special master process, and I think two points to that, Your Honor. First, we would disagree with that characterization, but I think it goes back to something else Your Honor said. Then why is Mr. Nelson needed as an expert in this case if it's duplicative of what can be found in the record elsewhere, and Mr. Nelson is clearly making an analytical leap based on, one, a field and a spreadsheet that during his deposition he admitted that he did not know one way or another whether that absence of that field indicated a user was in private browsing mode. He is simply saying, "I asked Google during my career for data. They provided data, and I'm assuming that that was private browsing mode data," and he does not have the -- the required --

THE COURT: It's probably not a bad assumption. I just don't know that I can verify it.

Okay. We're going to move on.

MR. MCGEE: Thank you, Judge.

MR. FORTENBERY: Thank you, Your Honor.

THE COURT: Let's go to Schneier. Who do I have?

MS. OLSON: Aly Olson from Quinn Emanuel.

MS. MARTIN: Jean Martin, Your Honor, from Morgan & Morgan for plaintiffs.

THE COURT: Okay. June Martin.

MS. MARTIN: Jean Martin.

THE COURT: And you said Olson?

MS. OLSON: Olson, yes. Aly Olson.

THE COURT: Alyssa Olson?

MS. OLSON: Alyssa, yes.

THE COURT: See, this is so great. So many issues. Everybody gets a turn at the podium.

Okay. We'll start with you, Ms. Olson.

MS. OLSON: Thank you, Your Honor.

Professor Schneier's reports read more like a closing argument than an expert opinion, and this is because his opinions are improper for a couple of reasons. First, he's opining on the ultimate issue of fact; that is, what a reasonable person would expect or understand approximately 30 different times. And even if such an opinion were a proper opinion, his opinion is further not reliable because the standards that he claims to apply are "I know it when I see it," which is the quintessential unreliable method.

THE COURT: Well, you've got about five different arguments, so let's just take them one at a time. That way I can get a response from Ms. Martin.

With respect to this argument that there needs to be a

fit, that seems to me, at least with respect to that argument, a stretch too far.

Ms. Martin.

MS. MARTIN: My apologies, Your Honor. Are you agreeing with us that there is a fit or are you agreeing with the defendant --

THE COURT: No.

MS. MARTIN: -- that we are stretching with the fit?

THE COURT: I am agreeing that there is a fit. That is, this isn't -- you're not going to agree. Rarely, if ever, do I have an opposing party come in and agree with the opposing party's expert. That's why you have experts.

This issue of a fit is -- it's almost a relevance objection, which is not a *Daubert* issue.

Now, there are some other arguments, but with respect to that one, as I tell the law clerks, when we have 403 objections at this point in the proceedings, you know that's the bottom of the barrel. Just if you're a young associate, 403 objections don't get you very far at this point. Maybe if we're in day three of trial, that would be different.

So I -- yeah. If you want to address the fit; otherwise, we will move on to the next one.

MS. OLSON: I'll just briefly respond, if I may, Your Honor, that I think fit actually is one of the *Daubert* requirements.

THE COURT: Not by the United States Supreme Court. There was a mention of it in a Ninth Circuit case, but it is not the bread and butter of *Daubert*.

MS. OLSON: Understood, Your Honor. Then I'm happy to move on to the other issues.

THE COURT: Consumer expectation opinions. Here, I think there are numerous opinions that seem to be, "Yeah, because I said so."

Ms. Martin, that's not enough for me. Go ahead.

MS. MARTIN: I agree, Your Honor. It is not enough to say "because I said so," but yet defendants' brief is replete with *ipse dixit* statements in and of itself.

Here, Professor Schneier has decades of relevant experience in cybersecurity and data security, and it is well-known that the application of an expert's specialized experience is in and of itself an appropriate expert methodology.

THE COURT: Right. But it's a step further to say that -- an expert can sit on the stand and say, "Based upon my research, this is my analysis." It's quite different to say, "And all consumers believe as I do." That, I think, is a step too far when you've done no analysis, no research, no surveys on consumer expectation.

MS. MARTIN: And I appreciate that, Your Honor, and we have read your admonishments in other cases and also what was

brought forth in the Calhoun hearing, and we understand -- we believe that we understand the contours of proper testimony for Professor Schneier and the other experts, and we anticipate and expect to fully appreciate those contours and abide by them in the context of a trial in presenting these experts' opinions.

I mean, here plaintiffs are seeking to establish that they have a reasonable expectation of privacy and that -- in their private browsing communications, and that Google's habit and collection of data is highly offensive to a reasonable user. We do not anticipate Professor Schneier going further to say what is unreasonable. He will be presented to use his background and experience to give the historical context of the evolution of privacy, to talk about the motivations of companies to collect and monetize data, why companies collect and retain data, and also the deceptive nature of the disclosures and Google's context from a standpoint of data privacy.

THE COURT: All right. Ms. Olson.

MS. OLSON: So I appreciate that. I think maybe that plaintiffs are conceding that they are not -- that Mr. Schneier will not be making the arguments that he makes in those 30 or so paragraphs, but this is -- this is our -- one of our three *Dauberts* that we're arguing now, and I think this applies for the entire case, not for just class certification. But I also don't think that the promises that they make resolve the issue.

Comments about the motivation of various companies, again, I don't think that Mr. Schneier has indicated that he is qualified to opine on motivations of companies in the industry or Google specifically.

She talked about the disclosures themselves, and I think that ties in to one of our other issues with Mr. Schneier's report, which is that he is just summarizing internal documents, summarizing disclosures, and saying that they are unreasonable. And I know plaintiffs cite to the *Berman* opinion, but I think Mr. Schneier is not like the expert in that opinion, who, in his daily work, was designing user consent interfaces.

Mr. Schneier doesn't -- he is a security expert, as was mentioned, and I think that --

THE COURT: Well, I certainly agree that he cannot testify as to intent.

MS. MARTIN: We agree, Your Honor, and Professor Schneier is not opining as to intent. He is opining as to the incentives and services and how Google's conduct conforms or does not conform to privacy standards and disclosures, how those disclosures do not conform to industry standards.

It is appropriate here to talk about why companies collect and retain data. That is an issue that can assist the jury in this matter, and that is what Professor Schneier will be discussing.

THE COURT: Okay. Any further comments? On this one, it really is a paragraph-by-paragraph analysis. There's lots in his report, I think, that is objectionable, so if there's anything else you want to say. But there's plenty there that is not, but there is stuff in there that is.

MS. MARTIN: If I may, Your Honor, Google has sought to strike or exclude Professor Schneier in its entirety. We believe that is overreaching. We do not believe that that is appropriate.

THE COURT: Any comments?

MS. OLSON: So we disagree with that, obviously, Your Honor. I think we cite the specific paragraphs that fall under kind of each of the buckets of issues that we have for Mr. Schneier. We cite on the bottom of page 9 to top of page 12 of our motion the various paragraphs where Mr. Schneier is opining on what reasonable people expect or understand. We cite to the various -- the very many paragraphs, the more than a hundred paragraphs where he is just summarizing internal Google emails.

The first six opinions which plaintiffs are claiming are teaching opinions, which don't really fall into what is normally a teaching opinion, a complex issue like thermodynamics, blood clocking, cardiopulmonary bypass --

THE COURT: I hope that if this ever gets to trial you're all going to have some nice demonstratives about how

things work because I know my jurors -- and some of them are going to know what you're talking about and some of them are not. And experts actually -- I mean, look, I got a presentation on Fortnite, and I never played it in my life.

So you are going to have to -- you do have to -- it is helpful to have people who can explain those things to you. And he does. My view is that if -- you know, some of this will stay in; some of it will come out.

MS. MARTIN: Your Honor, may I address the summaries of the documents? That it is appropriate for experts to render opinions based on information and data that they have reviewed personally. And in the *Borges* case, Dr. Barry Castleman -- it was found that on his years of experience and expertise, you know, it was more than just casual research for him to provide a description of the documents that he read to lay a foundation for his opinions, and that's what Professor Schneier is doing here.

And if he misdescribes, as Google has said, any of the findings or any of the documents, then that is fodder for cross-examination. That is not fodder for *a Daubert* motion.

THE COURT: Okay. Ms. Olson, you have the last word.

MS. OLSON: Sure.

I'll also just add to what Your Honor was saying earlier. Mr. Schneier was asked if he knows what Google does or what Google does not do, and Mr. Schneier said no, and while I

think -- I totally agree with you that there will be helpful testimony from experts about the technology, about what Google does, that's not Mr. Schneier. And --

THE COURT: But rarely, if ever, do I have one person who is the entirety of the case. This is a puzzle. That's what I tell my jurors. Lots of pieces, and he's just one of those pieces. That's all it is.

Okay. Next, Mr. Psounis. I'm not saying that right, I'm sure. My apologies to that person for butchering the name.

MR. MAO: Good afternoon, Your Honor.

THE COURT: And -- go ahead.

DR. ANSORGE: Good afternoon, Your Honor. Josef Ansorge.

MR. MAO: Sorry. Good afternoon, Your Honor. Mark Mao, Boies Schiller Flexner.

THE COURT: Josef Ansorge.

And you said?

MR. MAO: Mark Mao, M-A-O.

THE COURT: Got it. Okay. All right.

Your motion, Mr. Ansorge.

DR. ANSORGE: We're actually defending this one.

THE COURT: Plaintiffs' motion. Mr. Mao.

MR. MAO: Yeah. I will summarize pretty quickly, Your Honor.

Our motion is to strike certain portions of Dr. Psounis'

expert rebuttal report where he purports to be a rebuttal expert but has not actually looked at the data in which our moving expert analyzed and provided.

There were 160 sources identified by Google as relevant. Our expert looked at over 40, I believe 47 sources, and Dr. Psounis looked at one and came up with his alleged conclusions. These alleged conclusions was also tested by not Dr. Psounis himself and instead by an associate whose qualifications opposing counsel refuses to give. And therefore we believe that Dr. Psounis' portions on the data and what Google supposedly can and cannot do with the data should be stricken.

THE COURT: Well, what case, if any, do you have for the basic proposition that any expert must do or must perform the exact analysis of your own? They can attack it without having done the exact analysis. Why doesn't this just go to weight?

MR. MAO: Your Honor, it's because Dr. Psounis is a purported rebuttal expert, and he was only providing rebuttal opinions, so his rebuttal opinions do not look at and address the analysis that was provided by the expert in which he was supposedly rebutting nor the data in which he actually looked at.

THE COURT: All right. A response.

DR. ANSORGE: Yes, Your Honor.

Mr. Mao just stated that they are only seeking to strike certain portions of his report. There is 219 paragraphs in Dr. Psounis' report. Plaintiffs are striking 115. We don't believe that is an appropriate thing to ask for, and for the specific reason, as you have already put your finger on, Your Honor, there is no requirement for a rebuttal expert, especially at class certification under these conditions, to recreate the exact same analysis that the other expert conducted, nor did Mr. Hochman exclusively rely on the tests that plaintiffs are now referring to. Even a cursory glance of Mr. Hochman's report and appendices will show that there is many sources that are considered and looked at. And just like each one of his 31 opinions don't exclusively rely on any data tests, it would follow that they can also easily be rebutted without having to recreate the specific data tests.

With regard to the "tested by an associate" comment Mr. Mao made, he is referring there to a specific appendix, Appendix F, in which Dr. Psounis conducted an analysis of the distribution of IP address and user agent. That analysis -- am I too close?

THE COURT: You are having an issue with yours.

DR. ANSORGE: That analysis --

THE COURT: And, if you will, slow down.

DR. ANSORGE: Yes, Your Honor. I'm sorry for trying to get in so many words so quickly.

That analysis is discussed in four paragraphs in Dr. Psounis' report. So we don't believe it's appropriate or proportional to strike any parts of the Psounis report, but to the extent focus should be on the data tests, those are 4 out of the 219 paragraphs. None of his opinions exclusively rely on the tests and, indeed, they don't have to because Mr. Hochman in essence opined that individual class members could be identified by taking an IP address and a user agent, and that information combined had sufficient entropy to identify the class members.

And Dr. Psounis shows that that's contrary to the established information theory principles. He actually teaches courses on entropy. Mr. Hochman, at his deposition, said that well, Dr. Psounis' description of entropy appeared to be fine. He wasn't contesting any of the math, and it seemed to just be what was in textbooks.

So Dr. Psounis' opinions are both relevant and reliable, and for those reasons, we would ask that you deny plaintiffs' motion to strike Dr. Psounis' opinions.

MR. MAO: Your Honor, if I may address that real quickly?

THE COURT: You may.

MR. MAO: So counsel just pointed out exactly why there must be a direct rebuttal. Counsel conceded that Dr. Psounis was supposed to address Mr. Hochman's use of the

special master data, Google's data that produced -- that helped identify class members, and yet Dr. Psounis is supposedly looking at some other data sources and saying well, when Mr.-- without looking at what Mr. Hochman used in order to identify the class members. How in the world is a rebuttal expert that is supposed to rebut an identification process going to rebut the identification by looking somewhere else?

DR. ANSORGE: May I respond, Your Honor?

THE COURT: You may.

DR. ANSORGE: So that's not what I was saying. Dr. Psounis relied on a lot of different sources of information: 9 filed documents, 3 expert reports, hearing transcripts, 31 deposition transcripts, 118 public documents, 368 produced documents, which include all of the produced documents that Mr. Hochman cited and relied on in his report. Mr. Hochman's opinions didn't exclusively rely on tests, and they can easily be rebutted without having to rely on tests.

Indeed, Mr. Hochman states in his report that he was unable to identify class members at this time, and the reason for that is that the special master process was focused on the named plaintiff data. So to rebut it under those conditions is not necessary nor appropriate to reproduce data and analysis when the overall picture and theory are insufficient.

In any event, tests and which tests he conducted would all go to weight and admissibility, and we believe you explained

very clearly in your standing order in paragraph 11 neither of those are sufficient bases.

MR. MAO: Your Honor, that's just not true that Dr. Hoch -- Mr. Hochman's report obviously identified the class members and went through the entire exercise. If you just look at the rebuttal report, for example, pages 17, all the way through page 53 proved numerous ways and numerous examples of how class members were reidentified using the same data. We did the same thing in the opening report.

In a case like this involving what Google alleges it does not do with the data and our expert has actually identified, using Google's own data, where class members are being identified, the rebuttal expert -- we cited opinions as to what the rebuttal expert's job needs to be limited to be. The rebuttal expert needs to address that data to give examples of why the identification was either inaccurate or untrue. Dr. Psounis didn't do any of that in his purported rebuttal. If he wanted to offer something else as a moving expert, Google should have provided that.

Your Honor, lastly, this is particularly important in a case about what Google -- about what Google collects from private browsing in which Google has repeatedly refused to proffer and provide to the Court and to the public. Here the expert himself does not even have the data, Your Honor.

THE COURT: All right. We are going to move to the

balance of the class cert motion.

My reading with --

DR. ANSORGE: May I have two sentences to respond, Your Honor?

THE COURT: No. Rule 23(a), no one is really disputing numerosity; correct?

MR. BROOME: No.

THE COURT: And typicality; correct? You are not disputing that?

MR. BROOME: We have not made a typicality challenge, Your Honor.

THE COURT: Or adequacy?

MR. BROOME: We have not made an adequacy challenge.

THE COURT: Just getting it in the record.

MR. BROOME: Yep.

THE COURT: So the commonality, not really except we've got predominance; right?

MR. BROOME: We're at predominance.

THE COURT: So predominance is the big issue.

MR. BROOME: Yes.

THE COURT: Okay. So we've talked about implied consent. Assuming for purposes of argument we get past implied consent and then there is an analysis of the individual counts, we'll start from the top. Count 1 -- Count 1 and 2 I think can be done together.

MR. BROOME: Sorry. I have them organized -- is that the wiretapping and the CIPA claims, I think, Your Honor?

THE COURT: Correct.

MR. BROOME: Yes. So the argument that we make there, Your Honor, is that the issue of whether Google intercepted the contents of communications, which is required for both wiretapping claims under federal and state law -- that analysis requires individualized inquiries because URLs on their own do not qualify as content in every circumstance, and to determine whether a particular URL qualifies --

THE COURT: Didn't Judge Koh already decide at the class -- motion to dismiss stage that we are dealing with confidential communications?

MR. BROOME: Confidential is not the question in this analysis, Your Honor. The statute requires contents, the contents of a communication.

THE COURT: It is under Count 2; right? Under CIPA?

MR. BROOME: Sorry. Under CIPA 632. I was going to address that separately. That's correct, yeah.

But if we are talking about 631, the federal -- the ECPA wiretapping claim and the CIPA 631 claim, there there is a requirement that the plaintiffs show Google intercepted contents. And the Ninth Circuit in *Zynga* held very clearly that just a URL on its own without any sort of search terms associated with it or other user-generated content --

THE COURT: Right. But that's not what this is, is it?

MR. BROOME: It's not what it is.

THE COURT: All right. Go ahead.

MR. MAO: Your Honor, so you are absolutely right. Not only did this Court find that URL was sufficient for content for wiretap claims in the *RTB* case, as Your Honor just pointed out, all of the data, all the browsing histories at issue in this case involves private communications, things in which the user has explicitly identified as private. And under not only *Pharmatrak* but the statute itself of 28 U.S.C. 2510, which is the ECPA statute, content is merely defined as any information concerning the substance, purport, or meaning of those communications.

And Your Honor, as you may recall, specifically Google tries to identify whether or not a communication is actually confidential by the -- by the absence or the existence of the ex-client data header, for example. And here there is no dispute ever raised by Google that all of the communications at issue in this case, as defined by the Complaints, have ever been anything other than private browsing.

MR. BROOME: Again, Your Honor, I think we're talking about the federal and state -- Federal Wiretap Act and the CIPA 631 claim. If the issue is contents, whether it's private or not private is irrelevant. The issue is whether the

communication contains some user-generated message to the other party. And there is a controlling case on this. It's the *Zynga* case. It is the only Ninth Circuit case that has addressed this issue --

THE COURT: But that only addressed, right, the information that was in the header.

MR. BROOME: That's right. And that's the information that plaintiffs are claiming Google has intercepted uniformly across the class. Now, if they had said that we are uniformly intercepting URLs that contain search terms, while we would have the argument that that's not an analysis --

THE COURT: So Hochman argues that the URLs here as opposed to in the *In Re Zynga* case contain folders, subfolders, and precise files requested from web servers which are different and distinct from the URLs in *Zynga*. So talk to me about that specific distinction.

MR. BROOME: Sure. That's not something that could be established classwide, Your Honor. We're talking about a private browsing session. That may be one individual goes to one website, looks at one web page, and signs out. That person's a class member, but that person hasn't conveyed any content to Google.

Conversely or differently, you could have a class member who goes to google.com in their private browsing mode, conducts a search --

THE COURT: So what I'm concerned here -- the inquiry here is not a complete merits analysis. The inquiry here is whether or not there's sufficient common evidence for the plaintiffs to make their case with respect to this topic, and presumably you have an expert who's going to provide common evidence to rebut that. So isn't that sufficient?

MR. BROOME: No, Your Honor, because there is no evidence that Google intercepted contents from every class member. They have to establish that. They have a burden under *Olean* to show by a preponderance of the evidence that Google -- that -- on this claim that Google intercepted contents uniformly across the class, and there are multiple scenarios. I just gave Your Honor one, where Google would not have intercepted contents as that term has been defined by the Ninth Circuit. And that's why this claim can't be certified.

THE COURT: All right. A response.

MR. MAO: Real quickly, Your Honor.

We identified three types of contents. First, we do identify search terms, okay; however, we also identified full URLs.

THE COURT: The search terms aren't going to be sufficient under *Zynga*. Would you agree with that?

MR. MAO: I tend to agree with that except to the extent that there may be a subclass on search terms alone. But for URLs, we have alleged, Your Honor, and we've demonstrated

with our expert reports that these are full URLs. It has never been rebutted by the other side.

And then lastly, Your Honor, very important, all of the contents, all the communications here, all contain content because they are all tagged "private." Whether a message -- when I'm trying to look and ask from another person and say, "Hey, this conversation is private, I don't want you to let anybody know, please do not track this, please do not save this, please don't do anything with this communication," that, Your Honor, comports with the definition of a communication. And that is exactly what Your Honor just identified in terms of why this is so critical for Americans to be able to actually believe in Google's proffer of a choice.

MR. BROOME: Your Honor, if I may?

THE COURT: Hold on.

What you're talking about, it seems to me, is a nature of a communication as opposed to the communication. I make that distinction in this way. If Party A and Party B are communicating and then you have Party G, Google, where Party A tells Google, "I'm going to communicate with someone else, and I want it to be private," that's the nature of the communication as opposed to the communication itself. If the communication itself is just the URL, the Ninth Circuit says that that's not enough.

What you're talking about is some other communication with

Google, at least that's what I understood your argument to be; that the mere nature of the communication, that is, the mere agreement with Google that this is going to be private is somehow transformed into the communication between A and B. And I'm not sure that that gets -- that that's enough under the statute.

MR. MAO: I don't know if I quite agree with that, Your Honor, respectfully --

THE COURT: And that's fine. But that's what I want you to address.

MR. MAO: Sure, sure, sure.

Again, as Your Honor recognized in ***RTB***, that qualifications of 28 U.S.C. 2510 is that it's any information concerning the substance, purport, and meaning of that communication. That's how -- at least how that's defined under the ECPA. For CIPA 631, the word is "communication."

However, Your Honor, I do want to cite an additional case in which we had sent to the other side yesterday, which is S, period, D vs. Hytto, which is H-Y-T-T-O. It's a 2019 Westlaw 8333519, where vibration intensities sent via a body chat app constitute content because the court went back to read definition of "communications," which included substance, purport, and meaning of what was intended to be sent by the user.

And here, Your Honor, if we may just take a step back and

look at the idea of communications, if I communicate something and if that's not necessarily flagged for the other side -- although I would disagree with that here, particularly for Incognito because Google does flag that as confidential -- regardless of whether the receiving party, okay, fully appreciates that it's been labeled "private" I don't think is a requirement under the statute, so I do believe the fact that I actually want to communicate a private message, especially if it's understood by interceptor, that is communications, Your Honor.

THE COURT: You are trying to identify the tagging itself as a communication as opposed to the underlying communication.

MR. MAO: Yes, Your Honor. But the fact that I flag something as confidential -- for example, Your Honor, if I were looking at a political cite because I happen to be a Republican within the Ninth Circuit where, you know, it's a little more sensitive, the fact that I flagged what I'm reading as confidential, that would give an extra layer of meaning to that communication to the website to request that full page URL during a different situation. So I do respectfully disagree, Your Honor, at least on that.

THE COURT: Response.

MR. BROOME: Yes, Your Honor.

I think if you look at the *Zynga* opinion, the Court

distinguishes --

THE COURT: Remind me, *Zynga*, though, didn't have this extra layer of the privacy zone into which the party who -- let's assume for purposes of argument that the interception occurred. Here the argument is that the mere fact that you've entered into the zone that is a special privacy zone, whatever it is that I say in that zone of -- cone of silence is, in fact, a communication. That wasn't the case in *Zynga*.

MR. BROOME: I actually think it was, Your Honor. I'm just trying to locate the argument. I think plaintiff did make the argument that because it was -- they did not expect their communication to be intercepted, that there was an expectation of confidentiality, that that -- the court rejected that because the question -- again, you come back to is it contents, and the court's distinguishing between record information, right, addressing information, and that's what a URL is, right? If you go to a website or a web page -- and I have the exact quote here, Your Honor.

The court says, "The web page address identifies the location of a web page a user is viewing on the Internet and therefore it functions like an address. Congress excluded this sort of record information from the definition of 'contents'."

And if we come back to this case, the only information that plaintiffs can show Google intercepted uniformly across the class while users were in private browsing mode are web

page addresses, URLs. That's not contents.

THE COURT: So what are then the folders, sub-folders, and files referenced by Hochman?

MR. MAO: Your Honor, when it's a folder and sub-folder, it basically tells you it's pointing to a specific page; in other words, if you're looking in the *New York Times*, what particular story you're looking at. And I'm glad that Mr. Broome concedes that that is uniform and typical across the class because that is exactly what we've alleged.

But I want to add one more point real fast, Your Honor, which is that please note that even if you have to ponder a little bit more about this idea of tagging specific communications private, okay, with regard to a URL, if you are looking at full page URL, Your Honor, and I've tagged what I'm looking at private, I believe that that would certainly for anybody in the United States believe that that is communication when I'm requesting a specific page --

THE COURT: He is saying in *Zynga* it was private, and the Ninth Circuit said no, that's not enough.

MR. MAO: What Mr. Broome is talking about is different, Your Honor. I'm talking about the communication being tagged private.

What Mr. Broome is talking about is that in that context, they thought they were having a private moment. I profess that I do not recall that being in the *Zynga* case other than they

were making a claim on the basis of privacy and not that their communication, their request to the web page was private, but what we're talking about here, Your Honor, is where a specific page request, "hey, I want to see this following story," right, and I want to tag that private, Your Honor, I want to view that in my privacy -- in my private moment, I'm sorry --

THE COURT: Your reference -- and I apologize because I threw the word into the discussion. Define for me how you're using the word "tag." Is your use of the word "tag" the mere fact that you're in this mode?

MR. MAO: It's both, actually, but let me -- recall, Your Honor, there is a -- how would I call this -- a gigantic dispute in discovery over Incognito bits. Each Incognito bit was designed by Google to flag what was or what was not a private moment requested page, okay, in Chrome. And where you have a full URL and Google is specifically tracking "Hey, this person has specifically requested that I want to be in control," okay, "do not track me, I'm in my private moment," Your Honor, surely that that is communications.

THE COURT: So the argument is that when you're in Incognito mode, anything you do has an Incognito bit which tags it as private?

MR. MAO: Yes. And they are full-page URLs which Mr. Broome does not disagree in each and every moment, and they are also not disagreeing that it's tagged private.

MR. BROOME: Your Honor, first of all, we would disagree that the Incognito bit that Google was using is relevant at all to this. I mean, I don't think -- there is nothing in *Zynga* that suggests that because somebody is in a private mode, that somehow is conveying to a website that the communication -- or to Google that the communication -- sorry -- is conveying the content of a communication to Google.

The private browsing modes are actually designed not to indicate to the websites or Google that they are in private browsing mode. The ex-client -- the Incognito bit that Mr. Mao referenced was a more recent development later in the case, and that is not used to sort of uniformly across the class identify private browsing mode users. It was an inference based off of the absence of a header in Chrome -- it only applies in Chrome -- and the testimony throughout discovery, I think, has pretty much been unassailed, is that that is not uniform across the class. There are many instances in which that -- the ex-client data header -- the absence of the ex-client data header may not reliably identify a user as being in Incognito mode.

MR. MAO: Your Honor, respectfully, if you're not trying to -- so, first of all, we have not gotten all the evidence, but if you're not trying to identify users and you're not trying to identify Incognito sessions, I'm not sure why a bit to indicate whether or not the person is in Incognito or

not would be necessary. So I -- we fully disagree with that statement and representation, Your Honor.

THE COURT: Okay. Let's move on to Count 3.

MR. BROOME: So we are at CIPA 632, Your Honor?

THE COURT: You want to say more about that? I wanted to move to 3.

MR. BROOME: If you can remind me, Your Honor. I don't have them listed out by counts. I'm sorry.

THE COURT: Count 3 is the Comprehensive Computer Data Access and Fraud Act.

MR. BROOME: Yes. So this is an anti-hacking statute, Your Honor. It's the California equivalent of the Federal Computer Fraud and Abuse Act, and right in the text of the statute it requires that the authorization -- the access be without permission. So the statute requires that the defendant accesses the plaintiff's computer without permission.

We would argue, Your Honor, this comes back to implied consent, that many users are well aware that Incognito --

THE COURT: That doesn't need to be reargued.

MR. BROOME: Okay. Thank you, Your Honor.

THE COURT: 4 and 5.

MR. BROOME: All right.

THE COURT: Invasion of privacy and intrusion upon seclusion.

MR. BROOME: Thank you, Your Honor.

So there are three additional reasons why the privacy claims cannot be certified. The first is standing. At least one named plaintiff must have standing, and here, Your Honor, we would argue that none has standing to insert invasion of privacy or intrusion upon seclusion because these common law claims require that the privacy invasion be highly offensive. But the data collection at issue here consists of orphaned islands of browsing activity that are not identified with any particular user so Google's collection of it cannot meet the highly offensive --

THE COURT: I'm not going to make that kind of merits determination at this juncture.

The question is if there's sufficient evidence to support that at this juncture. So if you don't have anything to say on that particular issue, we can move to 6.

MR. BROOME: Well, I have additional arguments with respect to 4 and 5, Your Honor, although under both claims, there is a requirement that they show a reasonable expectation of privacy and here we --

THE COURT: Someone is saying, "I want to go to into Incognito mode," that's a reasonable expectation arguably. We're moving to 6.

MR. BROOME: Arguably, but not --

THE COURT: We're moving on. You've got stronger arguments. That's not one of them.

MR. BROOME: Pardon me?

THE COURT: You have stronger arguments. That's not one of them.

MR. BROOME: Thank you, Your Honor.

THE COURT: Breach of contract.

MR. BROOME: Breach of contract. Thank you.

So certification of the contract claim should be denied because the contract was not uniform throughout the class period.

THE COURT: Yeah. But why can't I -- even if I buy that argument, that's why we have subclasses.

MR. BROOME: Yes. Exactly, Your Honor.

THE COURT: So subclasses take care of that entire argument.

MR. BROOME: They don't here, Your Honor. They don't here because there are material variations throughout the class period in the alleged contract that give rise to very specific defenses that Google has that would be claim-defeating. The question is which defenses apply to which class members.

In order to -- we don't know -- we don't -- we are not able to tell when a given class member used any of the private browsing modes at issue here, so the only way -- well, let me take a step back.

We can't just assume that class members used Incognito mode or one of the other two private browsing modes

consistently throughout the class period. And we know that because we asked the plaintiffs when did they use private browsing mode. Well, they responded in response -- in --

THE COURT: Isn't that an issue with respect to damages?

MR. BROOME: No, Your Honor. It's an issue as to what -- which defenses apply to which class members because if, for example -- let me give you an example. One of the plaintiffs said, "I used Incognito mode in 2016 and 2017." Well, for that class member, we would say the alleged contract, which sort of starts at the Terms of Service and then goes to the Privacy Policy -- the Privacy Policy doesn't have any representations about Incognito mode in that period of time, right? So that class member would not have a claim.

In addition to that, during that same time period, there is a limitation of liability that limits that class member's damages to the amount they paid for the service, which is zero dollars here, right?

THE COURT: Didn't I just say doesn't that go to damages?

MR. BROOME: Well, it goes to damages. It also goes to predominance because we're talking about whether or not a class member actually has a claim in the first place. I agree, Your Honor. The liability issue, limitation does go to damages.

But the point is, is that depending on when a class member used private browsing mode, there are different defenses that apply, and if the plaintiffs themselves in response to interrogatory requests cannot reliably recall exactly when they used the private browsing mode and which private browsing mode they used -- I mean, some of these people -- I have some quotes here. We asked Plaintiff Brown, and he said, "I may have tried the private browsing mode with Microsoft's web browser once or twice," but he wasn't certain. He had also used Incognito mode.

We asked Plaintiff Byatt which other private browsing modes he used, and he said, "I may have browsed privately in Firefox but cannot recall any specific details of the activity."

And more generally, Your Honor, when we asked them this question, "which private browsing modes did you use and when did you use them," plaintiffs responded that this request was unreasonable, not proportional to the needs of the litigation. They said that because they used private browsing mode so that their activity would not be memorialized, they could not recall -- quote, they cannot recall the particular details of each and every time they engaged in private browsing mode.

THE COURT: All right. A response.

MS. BONN: Yes, Your Honor.

This is absolutely a damage allocation and proof-of-claim

issue for this reason, and I'll use just one example. Google in their brief says, "Well, we think Class 2, the contract, doesn't give rise to a claim between 2016 and 2018." That is a common argument. They could move for summary judgment on that, and if the Court were to agree, then that means we would have to make an adjustment to our aggregate damage model, and at a proof-of-claims post-judgment process, a plaintiff would have to sign an affidavit that says what time period did you use this private browser between 2018 and on. And anyone who put in an affidavit saying, "I browsed in 2016 isn't entitled to an allocation."

I will also say that Google itself has been from -- precluded from using the absence of complete data in order to challenge class certification generally or self-attestation in particular, and yet what I just heard from Google is that we no longer have records that can reliably identify who did what. So this is nothing more than an issue that, number one, can be taken care of with subclasses; number two, it is a common argument on the basis of a form contract that applied during a particular time period; and, number three, at best it's an argument about how an aggregate pie should be allocated amongst class members, and Google doesn't have standing under plain Ninth Circuit law, ***Ruiz Torres vs. Mercer Canyons***, ***Hilao vs. Estate of Marcos***, ***Six (6) Mexican*** to make any such argument. And moreover, they've been precluded from making precisely that

type of argument because of their refusal to fully produce and preserve data in this case.

MR. BROOME: Your Honor, that last point is a gross misrepresentation of the sanction that was imposed by Judge van Keulen, and the argument that we are making here that Google does not have the ability to identify private browsing users is not because Google failed to preserve data or Google deleted data that it should have preserved. The fact is that the data never existed in the first place. And the order does not preclude us from making that argument.

Ms. Bonn's assertion that class members can just put in an affidavit, well, we asked the plaintiffs to put in interrogatory responses, and their responses -- their response was, "This is burdensome. This is not proportional to the needs of the case. We can't remember the specific details." Now that it serves their interest, they want to have class member, tens of millions of class members, right, come forward and say, "I used this particular private browsing mode on these particular months" because their damages model is a month-by-month period --

THE COURT: It's a legitimate approach. It has been used in other cases.

MR. BROOME: It has but not in a case where the plaintiffs themselves have said, "We can't remember these kinds of details."

And, remember, Your Honor, it's not every private browsing mode at this point. That was the case when plaintiffs filed their Third Amended Complaint. We thought we were litigating a case about all private browsing modes. For some reason during expert discovery or before expert discovery, plaintiffs determined that not all private browsing modes created the same issue, and so they've narrowed the private browsing modes at issue to just three. We're going to ask tens of millions of class members to submit affidavits saying, "I used this" --

THE COURT: If you defrauded tens of millions of users -- if a jury found you defrauded them, then perhaps yes.

MR. BROOME: Well, respectfully, Your Honor, we did not defraud anyone.

THE COURT: I understand that's your perspective. That's not what I'm here to decide.

The question is whether the class can be certified so that those tens of millions of users don't have to sue you for $3 or $10 or whatever it is. That's the point of a class action.

MR. BROOME: I understand that, Your Honor. But Google also has rights in this proceeding, and we have defenses that are viable as to many, many class members.

THE COURT: Well, let's talk about certification of issues, bifurcation, liability findings without monetary damages.

Who wants to be heard?

MR. BROOME: I'm not sure -- I may step down, Your Honor, depending on what the question is. I'm not sure.

THE COURT: All right. I've got someone at the mic on this side.

MR. YANCHUNIS: So, Your Honor, in --

THE COURT: What is your name, sir?

MR. YANCHUNIS: I'm sorry, Your Honor. John Yanchunis of the law firm of Morgan & Morgan.

THE COURT: All right. Go ahead.

MR. YANCHUNIS: If one of the issues that you want to address is our request for certification under 23(b)(2) --

THE COURT: Go ahead.

MR. YANCHUNIS: I'm sorry, Your Honor?

THE COURT: Go ahead.

MR. YANCHUNIS: Yes. Thank you.

So in that request we seek an injunction to address four different activities. One is to stop the collection of browsing information data in connection with anyone using Incognito mode; in other words, make the button work or stop using the button.

Second of all, we seek that to the extent that information that we know has been collected and stored, that that be deleted.

The third element is -- and we've indicated in Mr. Hochman's report, the ways in which that information has

been used in the development of products and services, that that information either be extracted out or those products and services that use unlawfully collected information be destroyed.

And fourth, that the Court appoint an assessor to determine that Google has, in fact, complied with the injunctive relief if it's ordered by the Court.

The argument, which is really one sentence in the opposition to our request, is that we have an adequate remedy at law. Well, this deals with prospective conduct going forward as well as addressing the fact that they have information that they're going to continue to use in connection with their products and services. So an adequate remedy of law does not satisfy those elements that we seek in our injunctive relief.

They claim --

THE COURT: I've heard a lot of argument here, Mr. Schapiro, that none of these damages models work. If I accept your argument, then clearly they don't have an adequate remedy at law, and so injunctive relief is the only remedy that would be appropriate.

MR. SCHAPIRO: Two answers to that, Your Honor. First of all, a classwide damages model doesn't work. That doesn't automatically mean that injunctive relief is available. But I believe the law is also fairly clear that if the primary remedy

that the plaintiffs are seeking, even though we say you can't apply this classwide -- but if the primary remedy they are seeking --

THE COURT: This is an alternative, and it's a new -- I don't -- I don't think that's a strong argument.

MR. SCHAPIRO: Well, then let me give you an argument that I hope you will find is stronger, and that is, Your Honor, even if injunctive relief were somehow appropriate in this case, the relief -- the injunctive relief that the plaintiffs are asking for here is not feasible, goes well beyond the alleged harm, and I want to explain why, and would --

THE COURT: Yeah, but that -- again, isn't that something to be fought about later as opposed to whether or not a class can be certified to provide injunctive relief?

MR. SCHAPIRO: No, I don't think so, Your Honor, because also it would detrimentally affect users inside and outside the class whose rights are not going to be represented in an aggregate hearing, so there would be --

THE COURT: Again, that -- so you could -- assuming for the sake of argument that the tens of millions of people who you think like the way you've got this structured could continue to use it doesn't necessarily mean that you couldn't create two options: Incognito Total and Incognito, the way we used to have it, Original.

MR. SCHAPIRO: Incognito Classic.

THE COURT: Classic. There you go. Zero Incognito and Incognito Classic.

MR. SCHAPIRO: Well, Incognito Zero, we submit, would ultimately be a -- would lead to an Internet that doesn't even work for reasons that we've described. But I want to address your point head on about class certification here, which is -- and I would ask the Court if after this argument you are going back and you're thinking about injunctive relief, you look at specifically what the plaintiffs would be asking the jury --

THE COURT: Mr. Schapiro, I don't -- certainly if I'm going to issue injunctive relief, it seems to me that I shouldn't do it without hearing from the parties. It seems to be a judicious thing, to wait to hear from the parties before you do injunctive relief. That's not the question. The question is do I certify the class so that we can in fact have that discussion.

MR. SCHAPIRO: Respectfully, Your Honor, I don't think -- I can have -- take a position here where I don't think we can reach a resolution at the class certification stage without at least inquiring as to what it is they are seeking in their Complaint and in their papers, and what they are seeking is to delete -- is, first of all, to identify what information, what private browsing information has -- has been -- could somehow be linked to users and delete that. That would require violation of privacy standards.

Secondly, they're asking Google to remove any services that were developed or improved with private browsing information. That not only faces the problems above because they don't tell us what these are --

THE COURT: Mr. Schapiro, the fundamental thing they are asking for is that Google stop profiting off of data that is collected -- assuming their argument is true, right -- that is collected by people who are using Incognito with the understanding that you aren't collecting their data. In many ways, it's quite simple.

Now, all this other stuff, yeah, maybe you're right, maybe you're wrong, I don't know, but that's not a hugely complicated issue if in fact you are collecting data from users, the millions, the tens of millions of users that think you're not.

MR. SCHAPIRO: Your Honor, this case is about -- I don't think we will have a dispute from the plaintiffs about this -- is about people in private browsing mode who go to a site, let's call it the *New York Times*, although sometimes there might be different kinds of sites, and had thought, they say, that not only would their browsing history not be stored on their computers at that time, but that if they clicked an ad that was served up by Google, there would be no indication that that ad -- excuse me -- that the device that was clicking on that ad existed in any way, that you wouldn't know there was a URL or other device, because all that is identified in any way,

it's not a human being, it's there's a device somewhere that was in private browsing mode that clicked on an ad. I think there is no dispute that the cookies are all deleted at the end of a session.

THE COURT: Okay. Is there no dispute?

MR. YANCHUNIS: There is a dispute that the private browsing information of consumers is collected, stored, and used by Google.

THE COURT: See, that's the problem, Mr. Schapiro. I have got all of these plaintiffs' lawyers on this side shaking their head "no" when you're talking. They're shaking their head "no," which means there's a dispute.

MR. SCHAPIRO: I don't think they can reasonably dispute that the "you" who they are talking about when they say "you now" -- "you" -- the "your." "Your browsing isn't visible" --

THE COURT: Maybe I --

MR. SCHAPIRO: -- "to data; it's just a device."

There is a reason that we're permitted to undertake some discovery before a class cert hearing. And there is a record in this case, and the record is clear that the only thing that is collected is information that some computer somewhere clicked on an ad and then that is deleted. We have spent a lot of time in front of the magistrate, in front of the special master. If they had the goods on that, they would come forward

with it. They're not.

THE COURT: Maybe I need to have an evidentiary hearing in this case, too.

MR. SCHAPIRO: That's obviously up to the Court, but when we're talking about an injunction here, the reason I was raising that is that it is impossible to think of -- although at a high level, you would say, "Okay, well, stop profiting." What that would actually mean in a context like that, it means there should be no Google Analytic, we should identify people who are in private browsing so that when a web page, the *New York Times*, is visited by someone who is in private browsing mode, *New York Times* knows that person is in private browsing and doesn't serve ads. The Court would be heading down into a deep rabbit hole there, and so an injunctive class would not be feasible.

MR. YANCHUNIS: May I have the last word on this, Your Honor, or have you heard enough?

THE COURT: No. Go ahead.

MR. YANCHUNIS: Let me make clear that, again, that in connection with the 23(b)(2), the injunctive relief deals with prospective conduct. Damages deals with what happened in the past.

I think the Court has hit the issue right on the head. What we're talking about is the lick-log issue here, the merits. Whether it's feasible, not feasible, we certainly have

an expert, Mr. Hochman, who talks about the ways in which this information is collected and used, and to say it's not feasible, that doesn't -- isn't synonymous with "it hurts," "it's too hard." But at the heart of our UCL claim is the unfairness of the collection of this information.

THE COURT: Okay. I'll give you each five minutes for any parting comments, or you can yield back.

MS. BONN: Thank you, Your Honor.

THE COURT: Would you like five minutes?

MS. BONN: Thank you, Your Honor.

THE COURT: Go ahead.

MS. BONN: I would like to pick up with the argument that Mr. Schapiro just made, which I think sort of permeates the entirety of their brief, which is even if we made a promise that we won't collect private browsing information, that we won't collect the data if you're in a private mode, it's actually perfectly fine for us to collect it, use it to profit to the tune of billions of dollars, as long as we promise that we'll blur your face. We won't link it to the other set of data we have about you.

But that's not the promise at issue here. The promise we are alleging in the contracts is not that Google told its users, "Hey, you understand we're collecting all your data in private mode, but we promise we'll anonymize it. We promise we will pseudonymize it." No, the promise, as the Court found was

a plausible interpretation, was not to collect it in the first place. And all of the arguments that we have heard from Google today are ones that are common to the class. They don't raise individualized issues.

If Google's argument against injunctive relief is that it's too hard or this conduct isn't so offensive, that's a common argument. Their argument that well, some class members might have browsed in 2016 and we might have a better argument on the form contract during that period, well, then, they will bring a summary judgment motion, and it would bind the class during that time period. And at a proof of claim time after a judgment, that can be dealt with. That happens all the time.

What Google is really arguing here is that even though they have a form contract with every single one of our class members, even though that contract has been plausibly construed -- plausibly construed to support our interpretation, even though they've made a commitment in that form contract throughout the class period that they will not reduce rights without your explicit consent, that they can then come into court, object to class certification, which we all know means avoiding accountability, and say the contract's not worth the paper it's printed on, that is effectively the argument Google has made.

I would like to address a couple of other things that came up in the argument, and I just want to make sure we make our

points. One is there was a question about the survey evidence and how many people may have misunderstood things under Google's survey.

One thing I want to say is before we even get to the question of a survey, we have objective manifestation theory of contract and the promise of an explicit consent standard, so I don't think we're ever even going to get there. But even if we do, it's a classic battle of the experts. Google has their expert who performed a survey, admittedly not of Google accountholders, admittedly didn't ask about consent, admittedly didn't ask about the specific conduct in this case, being in a private mode on a non-Google website while signed out of your account, and we have a survey expert, Mr. Keegan, who did a rebuttal. He accounted for those errors, and what his survey demonstrates is that over 93 percent of respondents believed they have not consented in that particular circumstance, and that is over a hundred million Americans. So each of these issues is a common and classwide issue, even if we get there.

But at the end of the day what Google is effectively saying is you have no choice. You have no choice to have your private browsing data not be collected by Google because even if we promise not to collect it, even if we promise to rely on explicit consent, if you ever try to bring us into court, we are going to argue we can just collect it with impunity if we de-anonymize it, and, hey, maybe you guessed that was the case

because you read some article generally about tracking that doesn't even specifically address the contours of this case.

And that is why fundamentally this case should be certified as a (b)(3) class. Common issues predominate, and a class action is clearly the superior method of adjudication when there is a common form contract, common evidence of Google's tracking and interception behavior, and an aggregate damage model that's calculated from the top down using Google's own internal records, Google's own calculations of profits. If ever there is a case, a consumer case that fits the criteria to certify a class action, we respectfully submit that on our claims and our record, that is it.

And let's consider the alternative. If there were individualized cases, the same evidence would be presented. A plaintiff like Mr. Brown would come to court and present the form contract, the explicit consent provision, and would say, "I browsed privately during this time period," and Google would be precluded under the Court's prior order from contesting that because its data hasn't been fully produced.

Thank you, Your Honor.

THE COURT: Mr. Schapiro, five minutes.

MR. SCHAPIRO: Your Honor, if a trial of a class action were to proceed here, Google would face the very real prospect of being found liable to tens of millions of people who have not been wronged but with no way to show it. And the

law is clear that regardless of the difficulties that someone might face in an individual case, that a defendant has a right to raise defenses that are individualized, and when those individualized defenses predominate, class treatment is not proper.

I would ask the Court, because this is one of those instances in which there is some overlap between the merits arguments and the class certification arguments -- I think we've just heard some of them -- to read the disclosures that are at issue. I know Your Honor has. But to look again at them because the supposed promises do not appear in the form that opposing counsel has described them. And that's important because it goes to the variability in terms of what people understood, and it goes to the unworkability of class treatment.

That is particularly so, strongest, I think, for the contract case. And we have laid this out in more detail in our brief. Mr. Broome touched on it. But that is one area where subclasses would be entirely unworkable, and I think we would be on day two of a trial and the Court and the parties and the lawyers would be saying what have we done here because this is not a simple case where you would say oh, everybody before 2017 was subject to this contract and everyone after 2017 or 2018 was subject to that contract. The matrix is a Rubik's Cube essentially, and in each of the sides of that Rubik's Cube, we

have defenses that we are entitled to raise. It's laid out in our brief, and if we were required to try to argue against a contract, which again here is not a specific statement anywhere in one document but it is a series of inferences drawn from multiple documents -- without our ability to point to the specific documents at issue, we would be prejudiced unfairly and in violation of the governing law.

Ms. Bonn referred to the surveys a moment ago, and surveys of course are often used at the class certification stage here. And even Mr. Keegan's surveys -- even Mr. Keegan's surveys show that 35 percent of individuals were -- had knowledge and awareness of what the plaintiffs claim was the improper collection of their data here.

If you have a situation where both sides' survey experts show that a substantial portion of the public understood perfectly well what the question was but not everyone, that is not a case that is suitable for class certification. It's as if you had a case where there was someone who was using a taxi service and the agreement with that taxi service said we will use electric vehicles, and repeatedly the vehicles show up, and sometimes they're electric and sometimes they have combustion, and people go on using. It's quite evident that they are. And some people continue to use the taxi service; some people don't. That would not be suitable for class treatment. You would have implied consent, or if you don't want to call it

implied consent, waiver for some significant portion of the class.

I believe that the Ninth Circuit in this case would not approve of a certification that deprived Google of such fundamental defenses. We have laid out in our brief why the damages model is inappropriate for class treatment as well here and the standing problems that the plaintiffs face.

I guess I will close by saying I understand that the allegations here might at times seem salacious or extraordinary, and the plaintiffs at times in their statements, I think, have tried to rely on sort of a gut feeling that someone might have and say, "Oh, well if I wanted to be private and I was not able to be private," that there is something that screams out for a remedy here, and I would just again ask Your Honor to look at what the actual promises are here, what Incognito actually does, and I would respectfully suggest that if there are some people, like some of the named plaintiffs here, who had some different expectation, the world will not end if they are required to bring their cases as individuals.

THE COURT: Well, it might end for all of us in the Northern District who would have to try those tens of millions of cases.

Okay. You're plaintiff. Two minutes.

MS. BONN: Thank you, Your Honor.

I think the arguments we just heard are merits arguments.

They're common to the class.

There is a form contract in this case, and if Google thinks that the contract claim is a weak one during a particular time period, I presume they'll file a summary judgment motion, and if a class is certified and Google happens to prevail, then that would bind the class, but it is not a claim that varies on an individual-by-individual basis. It is not a reason to deny class certification under rule (b)(3).

And what it ultimately comes down to is that in this case, we have calculated the aggregate damage on a whole, so the arguments that have been made about well, maybe a contract claim won't exist during this discrete time period, that may result in a reduction of the aggregate damage award and then a proof-of-claim issue.

The other thing I want to say is that there has been a heavy emphasis on the notion of implied consent, but throughout this hearing -- I mean, in their briefs, Google said one sentence about the promise in the form contract throughout the class period with every class member: "We will not reduce your rights without your explicit consent." "Without your explicit consent."

Google doesn't seem to have an argument why that issue alone doesn't preclude them from raising an implied consent defense and therefore resolve the entire issue in one stroke. The only argument they made in their papers and the only

argument I've heard today is, "Well, you know, I don't think that's really what we're doing here."

Google is arguing that class members' rights under the contract not to have their private data collected should be reduced because people implicitly consented if they read a news article. That is a common and classwide issue that will resolve the issue of implied consent in one stroke, and this Court and the jury will never even need to question what did any person privately think in their mind if they read this article because it doesn't matter. It doesn't matter under the law and it doesn't matter under the contract.

Thank you.

THE COURT: Okay.

MR. SCHAPIRO: Your Honor --

THE COURT: This isn't a new argument. It's all over the briefs, so you don't need to respond. They're the plaintiffs. They get to close. That's the way it works in trial. That's the way it will work today.

I want to just compliment all the attorneys on both sides with respect to your briefing and the clarity of your work. It's a big issue and there's a big record, but it -- we do notice when we get good briefs, and we really do appreciate that.

So thanks for spending the time to come in. This, in my view, is so much better than anything that could happen on

Zoom. I think we're all very wary of doing this kind of work that way. I certainly can't interrupt and give you hand signals in the same way as I can in the courtroom. And, you know, it's nice to be back in the courtroom. So thank you very much.

And I'll take it under submission.

MS. BONN: Thank you, Your Honor.

MR. SCHAPIRO: Thank you, Your Honor.

(Proceedings adjourned at 4:24 p.m.)

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Thursday, October 13, 2022

Pamela Batalo Hebel

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